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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 207.

THE IOWA RAILROAD LAND COMPANY,
Plaintiff in Error,

vs.

CLAUDE F. BLUMER.

IN ERROR TO THE SUPREME COURT OF IOWA.

REPLY BRIEF FOR PLAINTIFF IN ERROR

—BY—

CHARLES A. CLARK.

Eastman Bros., Law Printers, 358 Dearborn St., Chicago.

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I.

TITLE DID NOT PASS UNDER RAILROAD GRANT OF 1856 AS AMENDED BY ACT OF 1864.

A matter of first importance, pointed out on page 11 of opening brief for plaintiff in error is, that the title did not pass from the Government under the grant of 1856 as amended by the Act of 1864. It was, moreover, withheld by the Land Department for the purpose of the adminstration of the grant, thus distinguishing the case from *Toltec Ranch Company* v. *Cook*, 191 U. S., 532, and other like cases cited on page 11 of brief for defendant in error.

It is undoubtedly true that the original grant of 1856 by Sec-

tion 1 made an out-and-out grant of the lands to the State of Iowa.

Section 4 of that act imposed restrictions upon the state as to the disposition of the lands and provided, "if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

This ten years expired in 1866, and there is no pretense that the road from Dubuque to Sioux City was completed within that time.

By the Act of March 2, 1868, the time for completing the road was extended to the first day of January, 1872. On March 10, 1868, the Legislature of Iowa resumed the grant of lands for this line of road, as made to the original railroad grantees. (See Appendix, pp. 10, 11 and 12.) Meanwhile, by the Act of June 2, 1864 (Appendix, pp. 4, 5 and 6), Congress provided by Section 8 thereof:

> "That no lands hereby granted shall be certified to either of said companies until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the legislature of the State of Iowa, to aid in the completion of such road."

The clear object and purpose of this section was to hold the legal title of the lands in the United States until the respective railways were built and completed as therein specified.

Let it be conceded that this would not be effective as to the

original railroad grantees under Act of the Legislature of Iowa of July 14, 1856 (Appendix, pp. 8 and 9); it still remains true that when the road was not completed as required by the grant of 1856, the lands then unsold reverted to the United States (Appendix, p. 4, top); and when Congress extended the grant in 1868 (Appendix, p. 7), the Act of 1864 became and was of full force and effect as to withholding the title to the lands and certifying them only in accordance with Section 8 of that act above quoted.

Hence the grantee of plaintiff in error, the Iowa Falls & Sioux City Railroad Company (Record, p. 3, par. 4, and p. 4, par. 2), never took the legal title to the land in controversy until it was certified under Section 8 of the Act of 1864. It is admitted (Record, p. 17) that the road was completed by the first day of January, 1872, within the time fixed by the Act of Congress, March 2, 1868 (Appendix, p. 7) extending the grant.

The lands had, therefore, been earned by plaintiff's grantee, but it could not and did not secure the legal title until certified January 20, 1903 (Record, pp. 27 and 28), and patented to it by the Governor of Iowa February 2, 1903. (Record, p. 29, Division II.)

It will be observed that Section 4 of the Act of the Legislature of Iowa, approved April 7, 1868, granted the lands to the Iowa Falls & Sioux City Railway Company, grantor of plaintiff in error, "subject to the terms and conditions of the Act of Congress granting the said lands, dated the fifteenth day of May, A. D. 1856, and the ACT AMENDATORY THERETO, and the Act of Congress passed the present session;" and also subject to other terms and conditions; while Section 5 of that act provided for the manner in which the lands granted should be patented by the Government to the railroad company. (Appendix, pp. 13, 14 and 15.)

A clearer case that the legal title to the lands did not pass until certified under Section 8 of the Act of Congress of 1864

and patented under the above Act of the Legislature of Iowa could hardly be made out.

It will be observed that the patent from the State of Iowa was issued under the Act of the Legislature granting these lands to the Iowa Falls & Sioux City Company.

This patent was required to be recorded by the laws of Iowa; Code of Iowa, 1897, Section 2939.

The Supreme Court of Iowa has recognized the doctrine that where lands have not been certified under the railroad grant of 1856 as amended, the legal title does not pass.

Dickerson v. *Yetzer*, 53 Iowa, 681.

Grant v. *Iowa R. R. Co.*, 54 Iowa, 673.

Doe v. *Land Co.*, 54 Iowa, 657.

Land Co. v. *Fitchpatrick*, 52 Iowa, 244.

Iowa Homestead Co. v. *Webster County*, 21 Iowa, 221.

As late as 1897 the rule of these cases was reaffirmed by the Supreme Court of Iowa with reference to this very land grant. The court said:

> "Now, it has been frequently held that such certification and patent *operate to transfer the legal title*, subject to be decreed to another who subsequently shows himself entitled thereto. . . . The cases of *Land Co.* v. *Fitchpatrick*, 52 Iowa, 244; *Iowa Homestead Co.* v. *Webster County*, 21 Iowa, 221; *Dickerson* v. *Yetzer*, 53 Iowa, 681; *Doe* v. *Land Co.*, 54 Iowa, 657; and *Grant* v. *Land Co.*, 54 Iowa, 673, are not in point, for the reason that in none of them was the land certified by the general government, and patented by the state. On the contrary, in each case *the title was withheld* by the general government pending a controversy between conflicting claimants, and it was thought improper to hold that the land was subject to taxation and to tax sales while the United States had a duty to perform in regard to it."
>
> *Iowa Railroad Land Co.* v. *Davis*, 102 Iowa, 132.

Numerous Iowa cases holding railroad lands under the grant of 1856, as amended by the Act of 1864, subject to taxation, all go upon the same ground. These cases hold such lands taxable only after they are earned and the company thus becomes

entitled to them. It is said that the companies then have *a taxable interest.* If they held the legal title the lands would be taxable, although encumbered by the requirement that certain conditions should be performed, or by any other encumbrance.

The cases cited by the learned counsel for defendant in error on pages 2 and 3 of their brief do not conflict with the rule for which we contend.

C. R. I. & P. Ry. v. *Grinnell*, 51 Iowa, 476, was where a naked trespasser entered into possession of the land after the railroad was fully constructed and the land fully earned. It appears from a remark of the court on page 485 that *the lands had also been certified*, the equivalent of a patent. Under these circumstances it was held that the railroad company had title to eject a naked trespasser. Nothing more is decided by that case.

Sioux City v. *Griffey*, 72 Iowa, 505, was a case where the land in controversy was not subject to the grant of 1856. It was excluded by the terms of the grant. Nothing more is decided in that case.

Nor did this court decide more when the case was brought here on writ of error. After fixing the time when the rights of the railroad company attached under the grant as the time when the map of definite location was filed, and not when the line was surveyed and staked out upon the surface of the ground, this court said, opinion by Mr. Justice Brewer:

> "Inasmuch as Griffey's pre-emption right had attached to this land *prior to such time, it did not pass to the railroad company under the grant;* it was a matter of no moment to the company what thereafter became of the title."
>
> *Sioux City Co.* v. *Griffey*, 143 U. S., 38-40.

True, this court says in that case that the grant was *in praesenti.* But the grant of inchoate right may be *in praesenti*, and the legal title may never pass.

Such are the decisions of this court as to the swamp land grant.

McCormick v. *Hayes*, 159 U. S., 332.

Rogers Co. v. *Am. Emigrant Co.*, 164 U. S., 570.

B. & M. R. R. Co. v. *Lawson*, 58 Iowa, 145, does not purport to determine that the legal title to the lands passed under the railroad grant as amended. There the defendant had attempted to enter the land as a homestead as late as 1878, after the land had been fully earned, and it was held that it was not subject to homestead entry. The court said:

> "It appears to us that whether the lands were withdrawn from sale or homestead or pre-emption or not, no valid sale or pre-emption could be made simply because the grant to the railroad company *had attached* to these identical lands. It was a present grant subject to be defeated upon failure to complete the railroad as required by law and upon no other ground. . . . THE RAILROAD WAS COMPLETED AND THE LAND PROPERLY CERTIFIED AS REQUIRED BY LAW, AND THE TITLE TAKEN THEREBY RELATED BACK TO THE DATE OF THE GRANT." (Page 148, bottom.)

It thus appears that the Supreme Court of Iowa in that case held *precisely the reverse* of the rule contended for by counsel for defendant in error, and in support of which contention the case is cited.

The case of *Iowa Falls & Sioux City Ry.* v. *Beck*, 67 Iowa, 421, involved lands upon which pre-emption claims had been filed before the filing of the map of definite location of the road. It was simply held that these lands were excepted from the grant, and nothing more was decided. It became wholly immaterial to determine when the legal title passed under the railroad grant, and nothing is decided as to this. If there were any intimation upon this question, it would be pure *dictum* and not decision.

In *C. B. & Q. R. R. Co.* v. *Lewis*, 53 Iowa, 102, it distinctly appears on page 103 that *the lands in controversy had been certified* by the Land Department and Secretary of the Interior under the railroad grant, and also certified by the Governor of Iowa to the railroad company. The holding of the court appears to be (page 107) that this certification was admissible

in evidence for the very reason that the title did not pass without it.

The case nowhere holds or intimates that the railroad company would have taken title under the grant, sufficient to maintain ejectment, in the absence of the certification standing in the place of the patent.

Courtright v. *C. R. & M. R. R.*, 35 Iowa, 387, is where the original railway company, grantee, had sold to Courtright certain of the lands in 1858 (see page 390) long before the Act of Congress of 1864, and before the lands had been forfeited or reverted. It was held that his title was good as against a subsequent railroad grantee claiming under a forfeiture for non-compliance in completing the road. So far as the question as to when the legal title passed was concerned, it arose wholly under the grant of 1856 and a sale made long before the Act of Congress of 1864 was passed.

This, moreover, was confined to the first 120 sections of land authorized to be sold under the grant of 1856. The lands sold Courtright were a portion of this first 120 sections. (See page 395, bottom; 396, top.) It does not appear from the opinion whether these 120 sections were certified by the Land Department and Secretary of the Interior or not. Presumably they were. But, in any event, what is said in that case as to the title of these 120 sections passing under the grant, and with reference to lands authorized by the grant to be sold, and, in fact, sold before any forfeiture, and before the Act of Congress of 1864, can have no bearing upon the question of title involved in the case at bar.

The case of *C. R. I. & P. Ry. Co.* v. *Grinnell*, 51 Iowa, 476, *supra*, was taken by Grinnell on writ of error to this court. This court was far from holding that the legal title passed under the Acts of Congress of 1856 and 1864; it was said, opinion by Mr. Justice Miller:

> "The grant under the Act of 1856 was, as has been often said, a grant *in praesenti*, and, though *exactly what*

this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done so that a surveyor or the officers of the Land Department can protract the lines of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title *relates back* to the date of the grant.

"So far as lands are found in place when this is done, not coming within the exceptions as sold or held under pre-emption, the title, or at least *the right to this land in place*, is at once vested in the state or in the company to which the state has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid *right* accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer.

"None of these difficulties arise in the present case. The location was made and the map filed in the land office, the selection of lieu lands was made and approved, *and the entire list regularly certified to the State of Iowa*, as early as December, 1858, and with this certificate the last act of the United States which could in any event be held necessary to passing the title was performed, and either the State of Iowa or the railroad company—it is immaterial which for the purposes of this suit—had become invested with the full legal title to the lands so certified." (P. 742.)

It was also said, and this applies forcibly to the defendant in error in the instant suit:

"It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which

the parties interested did not desire to be started." (Page 744.)

Grinnell v. *Railroad Co.*, 103 U. S., 739.

The distinction for which we contend was here clearly pointed out, but in its decision this court was far from holding in that case that the legal title passed before certification or patent under the Acts of 1856 and 1864.

The Supreme Court of Iowa did not in the instant suit overrule its own line of previous decisions above referred to, to the effect that the legal title only passed upon certification of the lands. But because there was some type of grant *in praesenti*, viz., as we then contended and now contend, a present grant of the right to earn the lands by building the road and receiving a patent therefor, that court held that as the lands were earned under such grant the statute of limitations would run from the date when they were earned. And so it was said in the opinion:

> "It is conceded that the grant to the railroad company was *in praesenti* and as the company *had earned the land* and all contests pending before the land department had been disposed of prior to 1892, its *ownership* for 10 years preceding the commencement of the action *was such as to be subject to the doctrine of adverse possession.*" (Record, 38.)

It is not held that the plaintiff in error ever had the legal title until it was certified under the railroad grant and patented by the Governor of Iowa in 1903. In support of the above quotation from its opinion, the court cites

Iowa R. R. Co. v. *Fehring*, 101 N. W. Rep., 120,

being one of its own decisions which is on its way to this court for review, together with other cases involving similar questions already upon the calendar of this court.

Turning to this case it will be seen that the Supreme Court of Iowa there distinctly reiterates and upholds its former line of decisions above referred to. It is there said as to lands under the Acts of Congress here drawn in question:

> "As will be observed, *the legal title did not pass from*

> *the United States until the execution of the certificate to the railroad company in 1901, and it is elementary that the statutes of limitations do not run against the Government. Young* v. *Charnquist*, 114 Iowa, 116, 86 N. W. 205; *Wilber* v. *Ry. Co.*, 116 Iowa, 65, 89 N. W. 101."

Then the court immediately adds, *arguendo:*

> " Possibly the company may have earned the land prior to that time; and if its title was perfect, and nothing remained for it to do save receive the certificate of title from the government, it is not perceived why the statute of limitations should not begin to run when entitled to such certificate. . . . In such case *the government retains* but *the naked legal title*, while the beneficiary of the grant is the real owner. But nothing of the kind is suggested in the division of the answer setting up the plea of adverse possession, and in the absence thereof the ownership must be presumed to have been acquired with the execution of the certificate. The averment of the petition that the plaintiff procured the title in 1901 was in no way obviated, and as *prior thereto it was in the government*, the statute of limitations could not have begun to run until then."

What the court below, therefore, does in the suit at bar is to now, *for the first time*, to put in force its suggestion *arguendo* in the Fehring case, and to hold for the first time that although the title is conceded to have remained in the Government until 1903 in spite of the efforts of plaintiff in error to secure it, yet because the lands were earned and plaintiff in error became equitably entitled to them, the statute of limitations therefore began to run while the Government still retained the title.

This new doctrine does not purport to rest, and does not in fact rest upon any statute of Iowa. It is a bald invention of the court below to defeat numerous decisions of that court, as well as this, to the effect that the statute of limitations will not run while the title remains in the Government.

We have no fear that this new invention will be sanctioned by this court.

This contemporaneous and long-continued construction as to whether the legal title passed under the Acts of Congress of

1856 and 1864, acquiesced in and acted upon for practically half a century by the State of Iowa and by the Land Department of the Government, ought not to be lightly disturbed, even if this court should think it might take a different view of the question as an original proposition.

It was well said by the Supreme Court of Massachusetts in a case where the contemporaneous construction of a statute affecting real estate was apparently erroneous upon technical grounds:

> "And although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."
>
> *Rogers* v. *Goodwin*, 2 Mass., 477.

This court has often recognized the same doctrine:

Stewart v. *Lairt*, 1 Cranch., 299.
Clintob v. *Englebrecht*, 13 Wall., 434.
Ferris v. *Higley*, 20 Wall., 375.
United States v. *Bank*, 6 Pet., 29.
Union Ins. Co. v. *Hoge*, 21 How., 35.
Edwards v. *Darby*, 12 Wheat., 206.
The Laura, 114 U. S., 411.

II.

DELAY IN CERTIFYING THE LAND.

It is argued for defendant in error that the matter of certifying the land was a mere clerical one after the decision against Carraher's application in 1891. Such it may be frankly conceded is the view of Mr. Burdette, one of plaintiff's witnesses, as pointed out in the brief for defendant in error. He also

testified that during the period from 1891 to 1903 the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grant. (Record, 21.)

But other grounds for the delay are shown by the Record. As stated by Mr. Burdette (Record, 19): "One of Carraher's contentions was that the grant in question had been adjudicated in 1863, and was fully satisfied. The long delay in the Secretary's office was in part caused by this contention." And see the decision of Acting Secretary of the Interior. (Record, 23.)

True, an adjustment of the grants was made by the Commissioner and reported to the Secretary in 1891. Mr. Burdette testified to his understanding that this adjustment was approved by the Secretary in his letter of April 9, 1891, "published in Volume 12 of the decisions of the Department of the Interior relating to public lands at page 347." (Record, 19.) That letter of the Secretary, however, simply refers to the adjustment of the Commissioner and its showing of a considerable quantity of land still due under the grant. It studiously refrains from approving the adjustment. On the contrary, it sets up that large quantities of lands not subject to the grant have been erroneously certified, and calls upon beneficiaries of the grant to release their claim and title to these lands. This is done under the Act of 1887 (24 Statutes at Large), requiring all railroad land grants to be adjusted, and requiring the Secretary of the Interior as to railroad companies to whom lands have been erroneously certified to "demand from such company a relinquishment or reconveyance to the United States of all such lands whether within grant or indemnity limits." Pending this demand on the part of the Secretary shown by the above-mentioned letter, and in connection therewith, it would seem that certification of the land in controversy was withheld, very possibly under the idea that the Government might retain this

tract as possible compensation for the lands erroneously certified, or for the purpose of coercing the company to comply with the Secretary's demand, or with a view of further investigation and further adjustment of the grant in connection with the Act of 1887. However this may be, certification of the land in suit was withheld in the face of the demand for it, and in connection with the administration of the grant. While it was so withheld the courts could not interfere to determine the legal title one way or the other. The court has said that as to certifying lands under such circumstances:

> "The solution of the question depends, in part at least, on facts within the province, primarily, of the Secretary of the Interior to find. In short, he, and he alone, must ascertain the facts which enter into the question as to what lands are to go on the lists to be delivered to the railroad grantee or its successor in interest. The court should not, by any decree, as between parties who have no contract relations with each other, attempt indirectly to control the authority and discretion of that officer to determine what lands shall or shall not be included in the lists to be prepared under his direction. The plaintiffs can not invoke the aid of the court to have these questions concluded, even as between them and the defendants, by an admission made in their bill for the purposes of this case. . . . The courts will not interfere with the Land Department in its control and disposal of the public lands under the legislation of Congress so long *as the title in any essential sense* remains in the United States."
>
> *Humbird* v. *Avery*, 195 U. S., 502-3.

And as to delays of the Department in administering such grants, it was said in the same case:

> "But, it is suggested that the final action of the Department may be indefinitely postponed and to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which an alleged successor in interest of the railroad grantee must have taken into account when accepting the act and assenting to the plan of settlement embodied in it. The Land Department was not required to complete its administration

of the statute within any designated time. The act upon its face directs that the required lists be prepared and delivered to the railroad company as soon as conveniently may be done. It can not be assumed upon this record that the Department has not progressed with the work of administration as rapidly as all the circumstances and its convenience permitted. Even if the fact be otherwise, it is not for the court of equity by its decree to decide in the first instance that the selections made by the railroad company shall be approved by the Secretary." (*Ib.*, 509.)

As said by this court in a recent case relating to the swamp land grant, opinion by Mr. Justice Brewer:

> "Until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."
>
> *Oregon* v. *Hitchcock*, 202 U. S., 70.

See also:

McCormick v. *Hayes*, 159 U. S., 332.

Rogers Locomotive Co. v. *Emigrant Co.*, 164 U. S., 559.

As already pointed out, the court below did not hold that the legal title vested in the grantor of plaintiff in error, either with or without the delay in certifying, but based its decision upon the ground that, having earned the land, its "*ownership*" "was such as to be subject to the doctrine of adverse possession." (Record, 38.)

III.

TITLE BY PRESCRIPTION. CARRAHER'S "GOOD FAITH," COLOR OF TITLE, AND CLAIM OF RIGHT.

1. It will be observed that counsel for defendant in error have not a word to say as to the good faith of Carraher in his alleged adverse possession—not a word. Yet this is a necessary ingredient to title by prescription. The court below found

this element and color of title only by repudiating and disregarding the decision of the Land Department under the timber culture act, in a proceeding instituted by Carraher himself, that the land was not subject to entry under the timber culture act, and that the entry made while that proceeding was pending "was without authority and the entry has this day been cancelled." (Record, 23-24.) This decision was especially set up and relied upon by plaintiff in error. (Record, 3; par. 7.)

The court below found good faith on Carraher's part notwithstanding this decision in Carraher's own proceeding by saying: "But whether Carraher was advised of this is not disclosed. Not having been accorded a hearing nor given any previous notice of the Department's intention to cancel his entry, it is not to be inferred that he was subsequently informed of what had been done. See *Wilbur* v. *Railway Co.*, 116 Iowa, 65, and cases there cited." (Record, 39.)

In the Wilbur case that learned court held that a decision cancelling a homestead entry was "in the nature of hearsay, and not competent to show what was in fact done." (116 Iowa, 67.) The learned court below adds on this question of good faith, "and there is no ground for saying that he was *not* acting in good faith save this knowledge of the adverse decision on his first application in 1891. But he was not claiming under that, but by virtue of the receipt which he had obtained in 1888, and under which, *for all that appears*, he supposed he might acquire the land." (Record, 39.)

As good faith is a necessary ingredient entitled by prescription, it is one of the elements to be proven by the party claiming the prescriptive right. It will be observed that the only suggestion or hint of good faith made by the learned court below is based upon turning this rule around and putting upon the owner of the legal title the burden of showing bad faith. Joined to this is the repudiation of the decision of the Department upon the ground that it *may* not have come to

Carraher's knowledge, imposing upon plaintiff in error the burden of proof as to this also. But the mischief does not end here. That learned court splits a single decision which held the land not subject to Carraher's entry, and cancelled that entry accordingly, into two decisions, one of which Carraher must have known, and the other of which it is said he may not have known. Then the learned court performs the remarkable feat of holding that, although the Land Department decided, and decided rightfully, after having before it for years a proceeding instituted by Carraher, that the land was not subject to entry under the Timber Culture Act, yet Carraher, with full knowledge of this rightful decision, may have been justified in assuming that the land was subject to such entry, and could therefore obtain title by prescription by claiming that it was subject to such entry in the very teeth of a decision by which he was and is incontestably bound. There may be other feats of judicial legerdemain which equal this in divesting the owner of a landed estate of his title, but we have never seen nor heard of them. Manifestly, as to good faith, it can make no difference whether Carraher was strictly bound by the decision cancelling his entry or not. We think it clear that he was, as it was a necessary incident as to his own proceeding to secure such entry. Whether this is so or not, knowing of the decision on his own application, that the land was not subject to timber culture entry, and being absolutely bound by that decision, with no pretense that it did not correctly declare the law, it is impossible that he could in good faith claim that the land was subject to such entry in the teeth of the conclusive adjudication against him. If the juggle can be upheld that he could shut his eyes to a part of the decision and thereby not know that his entry was formally cancelled, it still remains true that knowing of the decision that the land was not subject to entry, and being bound thereby, he necessarily and conclusively knew that his entry was wrongful, whether cancelled or not, and it was not possible

for him to make any claim in good faith under that entry. He never did claim under that entry. The record shows that he simply "claimed he owned the land," being discreetly silent as to all else; not that he ever claimed the right to acquire title under the timber culture act, or that he had acquired title under that act. (See references to Record, page 4, brief for plaintiff in error.)

The learned court below, therefore, at the very basis and foundation of the prescriptive claim, puts its judgment upon denying all effect to the decision of the Land Department and wholly repudiating that decision. Herein, we submit, was patent error. As this is the cornerstone of the whole fabric of the prescriptive title, that fabric tumbles into a mass of ruins, and the contention for defendant in error must fail.

2. The "color of title," then, was based upon a wholly void receiver's receipt, and Carraher knew it. It was no color of title, and it was tainted by bad faith. None the less we have the remarkable feat of a "claim of *right*" based upon this, which the court below held to have ripened into a meritorious and lawful prescriptive title. "Do men," then, "gather grapes of thorns, or figs of thistles"?

3. Regardless of what precedes, it was held that Carraher had a good "claim of *right*," which set the statute of limitations in motion from 1891. We have seen that his claim was one of *wrong*, and bad faith. A claim under a void sheriff's deed, or a void tax deed, will not support title by prescription.

Walker v. *Turner*, 9 Wheat., 541.

Redfield v. *Parks*, 132 U. S., 250.

It was long ago decided by this court, opinion by Mr. Justice Story, that—

> "if the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it to a fee."

And as to presumptions of a grant from long possession:

> "They may, therefore, be encountered and rebutted by

> contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant; *a fortiori, they can not arise where the claim is of such a nature as is at variance with the supposition of a grant.*"
>
> *Ricard* v. *Williams*, 7 Wheat., 108-9.

The only claim of Carraher was under his timber culture entry. This was surely "at variance with the supposition of a grant," and the statute would not be put in motion by such claim so that it could ripen into a prescriptive title in fee. This claim was not of the title to the estate. It was merely a claim to an equity in the estate. What must Carraher have done under this claim to secure title? He must have complied with the Timber Culture Act, and must then have secured his patent from the United States. He could secure no such title or patent under his claim, and he was fully aware of that fact. If he had applied for it, his application would have been rejected, and his claim would have been a mere futility. It seems obviously impossible that such a claim as this could ever by any possibility ripen into a fee title. On its face it disproved the presumption of a grant so long as it was made. The statute of limitations, therefore, could not run against the fee title until after the period for Carraher to procure or attempt to procure his patent from the Government, which would be in 1896. If it run after that time the ten years required for a prescriptive title had not elapsed. It could not run before that time, under any general claim of ownership or title, for as to this Carraher had no color of title, nor had he any element of good faith or claim of right whatever.

This analysis is submitted as a sufficient reply to the reasoning of the learned court below in attempting to put the statute in motion for the purposes of a prescriptive title to the fee, while Carraher claimed nothing but a qualified right and conditional interest or equity, if we may so misuse the word, which he knew to be utterly futile and void (see Record, 40-

41); and as a sufficient answer to the labored effort of the learned counsel for defendant in error, together with the authorities relied on, pages 2 to 11 of their brief.

It still remains true, as declared by Mr. Justice Miller, that

> "where one takes possession of land without title, or claim, or color of title" (which does not mean color of some supposed right to acquire the title) "that such occupancy is not adverse to the true title, but, subservient thereto. . . . An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain possession of the parties entering must be accompanied by a claim of title. . . . there is no claim of right the possession can not be adverse to the true title."
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> *Harvey* v. *Tyler*, 2 Wall., 349.

It is only by denying any effect whatever to the decision of the Land Department which it is admitted declared the law correctly, made in a matter undeniably within its jurisdiction, and to which Carraher was a party, and by summarily nullifying this decision, that any semblance of claim of even a qualified interest in the land on the part of Carraher can be made out. That is what the learned court below attempted. Plaintiff in error asks that this lawful and orderly administration by the Land Department, of the government of matters committed to it, shall not be thus invaded in defiance of law, and titles derived through it from the Government be brought into intolerable confusion and uncertainty, and summarily ripped up and nullified.

CHAS. A. CLARK,
WM. G. CLARK.